

IN THE  
CIRCUIT COURT  
MONTGOMERY COUNTY, TENNESSEE  
DIVISION III

FILED  
4/16, 2012, 1:08 A.M./P.M.  
CHERYL J. CASTLE CLERK  
CIRCUIT COURT CLERK  
BY: W. A. ... D.C.

OMAR THERON DAVIS, )  
Petitioner )  
 )  
v. ) Case No. 40500164  
 )  
 ) (Post-Conviction)  
STATE OF TENNESSEE, )  
Respondent )

**ORDER DENYING PETITION FOR POST-CONVICTION RELIEF**

This matter came before the Court on February 28, 2012, for a hearing on the petitioner's pro se and amended petitions for post-conviction relief. In his petitions, Mr. Davis argues that he received the ineffective assistance of counsel at trial. Having reviewed the record and the post-conviction petition, and having conducted an evidentiary hearing, the Court finds that the petitioner has failed to establish that he received ineffective representation at trial. Accordingly, the Court denies the petition.

I. PROCEDURAL HISTORY

A Montgomery County jury found Mr. Davis guilty of three counts of aggravated rape and one count each of especially aggravated kidnapping, aggravated robbery, aggravated burglary, and theft greater than \$500 but less than \$1000. The Court imposed sentences of twenty years for each aggravated rape conviction, with those three sentences to be served consecutively. The court imposed concurrent sentences of twenty years for the especially

aggravated kidnapping conviction, ten years for the aggravated robbery conviction, five years for the aggravated burglary conviction, and one year for the theft conviction. On direct appeal, the Court of Criminal Appeals affirmed the petitioner's convictions, the imposition of consecutive sentences, and individual sentences for aggravated rape and especially aggravated kidnapping, but pursuant to Blakely v. Washington, 542 U.S. 296 (2004), the appellate court reduced the petitioner's sentence for aggravated robbery to eight years and his aggravated burglary sentence to three years. See State v. Omar Theron Davis, No. M2007-02206-CCA-R3-CD (Tenn. Crim. App. Dec. 16, 2008) (hereinafter "Davis C.C.A. Opinion"). The Tennessee Supreme Court denied the Petitioner's application for permission to appeal on June 1, 2009.

The Petitioner filed a pro se petition for post-conviction relief on May 11, 2010; thus, jurisdiction is properly before this Court. See Tenn. Code Ann. § 40-30-102(a) (2006). The petitioner's first two appointed post-conviction counsel both withdrew; initially-appointed counsel filed an amended petition May 18, 2011. The petitioner's third appointed post-conviction counsel appeared at the evidentiary hearing, which the Court held February 28, 2012. Present post-conviction counsel filed a second amended petition the day of the hearing.

## II. ISSUES PRESENTED FOR REVIEW

The petitioner raised the following claims in his pro se petition:

- (1) Collier Goodlett, the petitioner's trial counsel, rendered ineffective assistance by not challenging the introduction of serology and DNA evidence, as presented at trial by Clarksville Police Department Detective Ronald Parrish;

(2) Mr. Goodlett rendered ineffective assistance by failing to challenge on multiplicity grounds the three counts of aggravated rape charged in the indictment;

(3) Mr. Goodlett rendered ineffective assistance by failing to challenge on multiplicity grounds the counts of aggravated burglary, aggravated robbery, and theft of property charged in the indictment; and

(4) Mr. Goodlett rendered ineffective assistance by failing to conduct an adequate voir dire to identify potentially prejudiced jurors and failing to seek a continuance and change of venue.

In his first amended petition, the petitioner raises these additional claims:

(5) Mr. Goodlett rendered ineffective assistance by failing to request that the petitioner be sentenced under the 2005 revisions to the sentencing act;

(6) Mr. Goodlett rendered ineffective assistance by not investigating this case adequately;

(7) Mr. Goodlett rendered ineffective assistance by failing to prepare adequately for the petitioner's trial;

(8) Mr. Goodlett rendered ineffective assistance by meeting with the petitioner only once in the time prior to the week before trial and failing to discuss the case with the petitioner adequately;

(9) Mr. Goodlett rendered ineffective assistance by "strenuously advis[ing]" the petitioner "that he should not testify because he would only anger the Judge."

In his second amended petition, the petitioner raised one additional claim

(10) Mr. Goodlett rendered ineffective assistance by failing to "adequately pursue the identity of the DNA evidence found at the crime scene."

### III. EVIDENCE PRESENTED AT TRIAL

The Tennessee Court of Criminal Appeals summarized the evidence presented at trial:

The appellant was originally charged as a juvenile but was transferred to circuit court to be tried as an adult. At trial, K.G. [as the victim is referenced throughout the opinion] testified that she was home alone at approximately 7:00 a.m. on November 8, 2004, when her doorbell rang. When she opened the door, a man wearing a ski mask, a dark jacket with a hood, and black gloves barged into the house. He was carrying a handgun. She tried to leave, but the man slammed her into a wall, knocking her down. He then tied her hands behind her back. She said that she cried and pleaded with him to stop and that he held the gun to her head and told her to shut up. He removed her pants, pantyhose, and underpants and grabbed her arms, forcing her to the bedroom with the gun against her back. Once in the bedroom, he tied a sweater around her head so that she could not see anything. She said that she heard him getting undressed and that he raped her vaginally in several different positions. Afterward, he forced her into the kitchen where he used one of her kitchen knives to cut off her blouse and bra. He then took her into the bathroom where he fondled her and replaced the sweater that was covering her face with a bandana and something else over her eyes.

K.G. testified that the appellant forced her into the shower with him and washed her. She said that he dried her off and forced her back into the bedroom where he lifted her onto the bed and performed cunnilingus. He then held the gun to her head and forced her to perform fellatio. He raped her again vaginally. During the attack, he mentioned K.G.'s daughter and told K.G. that she "had better cooperate." K.G. said that the bandana loosened so that she was able to see the appellant's face clearly. The attack ended when K.G. told the appellant that she could not keep up anymore and pretended to pass out.

K.G. said that she heard the appellant ransacking her bedroom after the attack and that the appellant found a loaded gun that she kept in the drawer of her night stand. She said the appellant put the gun to her head and asked if she had any more guns in the house. She told him about a broken rifle that was in the closet. He then asked her whether she had more bullets. She denied having more bullets, although there were some in one of her drawers. The appellant continued to rifle through the house until he found her purse. He lifted the bandana from her eyes to ask her about her two credit cards and her car key. She gave him the "PIN number" for one of the credit cards and confirmed that the key he found belonged to her car. He placed the bandana back over her eyes, and she heard the sound of zippers as though he were placing items in a backpack. Before the appellant left the house, he forced the victim onto her stomach and tied her wrists and ankles together behind her.

K.G. freed herself and called 9-1-1 a little after 8:00 a.m. When police arrived, she told them what had happened and that her car was missing. She

was afraid that her daughter was in danger and insisted that the police send someone to Kenwood High School to get her daughter. Later that day, police showed K.G. a Kenwood High School yearbook, and she identified the appellant as her attacker.

The parties stipulated that the appellant arrived at Kenwood High School at 8:47 a.m. on November 8, 2004. Hal Bedell, the school principal, testified that the appellant signed in late that day. Based on a telephone call he received from the Clarksville Police Department that morning, Bedell instructed the school security officer to search the school parking lot for the victim's car. The car was discovered in the student parking lot. At approximately 9:00 a.m., Bedell advised Detective Parrish of the Clarksville Police Department that the car had been found.

Detective Ronald T. Parrish testified that he went to the appellant's home around 6:00 p.m. on November 8, 2004, and searched the appellant's bedroom. He found a wet bandana and a backpack underneath the appellant's bed. Inside the backpack, he found items the victim had reported missing, including the gun from her night stand, one of her credit cards, her bra, her cellular telephone, two microcassette recorders, photographs, pens, and pencils. Detective Parrish also testified that the appellant was excluded as a contributor of DNA that was obtained from the victim's rape kit. The victim testified that she had intercourse with her fiancé during the weekend preceding the attack.

Davis C.C.A. Opinion, slip op. at 1-7 (footnote omitted, alteration added).

#### IV. EVIDENTIARY HEARING TESTIMONY

At the evidentiary hearing, the petitioner presented the testimony of the following witnesses:

- Omar Theron Davis, petitioner; and
- Collier Goodlett, petitioner's trial counsel.

The Court accredits Mr. Goodlett's testimony and does not find the petitioner to be a particularly credible witness. However, the Court will summarize the testimony of both witnesses to present the evidence completely and facilitate appellate review.

Omar Davis

The petitioner began his testimony by recounting the issues he raised in his various petitions for relief. Regarding his assertion that Mr. Goodlett did not communicate with him adequately, the petitioner said that he "only heard from [Mr. Goodlett] approximately two times and then the week before my trial, he kept telling me that he didn't—he wasn't properly ready for my trial, he wasn't prepared." The petitioner said that he wrote counsel several letters expressing his disapproval with counsel's failure to talk with him, but these letters produced no response from his attorney. The petitioner said that Mr. Goodlett "had nothing in my defense" and that his attorney told him that he wanted the petitioner to take a plea agreement that was "on the table." Specifically, the petitioner claimed the proposed deal was twenty years at 85%. The petitioner said that he wanted to go to trial, but after Mr. Goodlett "was persistent in saying he didn't have no defense for me," the petitioner decided to take the deal. However, by time the petitioner told counsel that he wished to plead guilty (which the petitioner said occurred the day of jury selection), Mr. Goodlett told the petitioner that the deal was "off the table."

The petitioner stated that his main assertions concerned counsel's alleged mishandling of the DNA evidence presented at trial. The petitioner said that Mr. Goodlett failed to bring up the fact that the DNA evidence did not identify him as the assailant. Specifically, the

petitioner said, “semen was found, DNA evidence was found, but it proves it wasn’t me, and [Mr. Goodlett] . . . didn’t instill it into the jury’s mind what it meant.” The petitioner noted that counsel did not call any expert witness, such as a forensic scientist, to testify regarding the DNA findings, and he also faulted counsel for not seeking to identify the actual contributor of the DNA evidence found at the crime scene. Furthermore, he faulted counsel for not objecting to the introduction of the DNA evidence through Detective Parrish.

Regarding his assertion that counsel improperly advised him regarding his right to testify, the petitioner recalled that at the close of the state’s proof at trial, the Court informed the petitioner of his right to testify. The petitioner told Mr. Goodlett he was unsure, so counsel told the petitioner to think about it overnight. The next day, the petitioner told Mr. Goodlett that he thought he would testify; according to the petitioner, counsel responded by telling the petitioner that “the Judge was mad” and that the petitioner would further make the Court mad if the petitioner chose to testify. The petitioner, “believing at that time that my lawyer had my best interests” in mind, chose not to testify. The petitioner believed that he “should have” testified, and that his failure to do so affected his case negatively. The petitioner acknowledged that he did understand “a fair amount” of the Court’s advice regarding his right to testify.

The petitioner also asserted that pretrial publicity was excessive in this case. He said that “the week of and the coming months of my trial . . . [news of this case] was all in the newspaper, on the news, it was throughout—even in the County jail, it was everywhere.” He added that there “was no way nobody from Clarksville didn’t know about my case . . . it was

too hot at that time, so people already had what they believed what truly happened, whether I was guilty or not.” He claimed that he would have had a better of chance of prevailing at trial had Mr. Goodlett requested a change of venue or “at least a set off date a couple months later or so[.]” The petitioner said that counsel never discussed a change of venue with him.

The petitioner also claimed that the burglary and robbery charges should have been “merged” because the alleged offense was an ongoing crime.

On cross-examination, the petitioner said that he “believed” the jury was shown the TBI report showing that the DNA found inside the victim was not his. He acknowledged that he was not in possession of any of the supposedly prejudicial media reports regarding his case and that prospective jurors, when asked about publicity on voir dire, indicated they were unaware of the victim’s case.

#### Collier Goodlett

Mr. Goodlett, who testified that he has served as Assistant District Public Defender for “almost twenty years,” recalled talking to the petitioner “several times” about this case in the year and a half he represented the petitioner. When asked whether there was anything “unusual or out of the ordinary” in preparing for this trial, Mr. Goodlett replied,

Perhaps . . . the most difficult thing in this trial as a defense lawyer was that within an hour to two hours of this event occurring and the police being called, items that came from the victim’s home were found in the home of the Defendant, under his bed, or on his bed, I can’t recall which, but they were in his bedroom and it was one of those things where I am not quite sure what I could have done or who I could have called to explain how they managed to make their way from the victim’s house to his house[.]

Mr. Goodlett recalled discussing this concern with the petitioner, and counsel insisted that he spoke with the petitioner more than the once or twice prior to the week before trial identified by the petitioner. Mr. Goodlett said that he was unable to review the jail sign-in sheets to verify this claim before the instant hearing.

Mr. Goodlett also disagreed with the petitioner's assertion that counsel was not ready for trial. Mr. Goodlett specifically denied telling the petitioner he was not ready to proceed. Counsel recalled telling the petitioner that "he absolutely needed to consider these [plea] offers" from the State, although he did not recall the incident recounted by the petitioner in which the petitioner said that he was willing to take the state's deal, only to have the state withdraw the offer.

Mr. Goodlett testified that he reviewed the various witness statements and laboratory reports in this case. Regarding the DNA evidence, Mr. Goodlett disagreed with the petitioner's assertion that the TBI report failing to link the petitioner to the DNA taken from the victim "exonerated" the petitioner. However, Mr. Goodlett said that he "would have thought that I did" argue the lack of DNA evidence and other physical evidence in his closing statement. Mr. Goodlett denied the importance of discerning the identity of the contributor of this DNA evidence. When asked to explain why he did not find this fact important, Mr. Goodlett replied,

Well, in every criminal case, there are things that are called facts beyond change, and that is a fact that no matter what I say or my client says, the jury is going to believe that fact to be true, and the problem in this was that within—I will say two hours, it may have been shorter, but within two hours' time, Mr. Davis appeared at his school with the victim's car. He checked into

the school and his checking in—it was a sign-in sheet and he was also on videotape. I don't recall the exact sequence of events, but as I said earlier, within two hours, the police were at his home where he lived with his stepfather and mother and I seem to recall that being within five or six houses from the house in which [the victim] lived and where this occurred and at that time, they found personal property belonging to the victim, in this case in his room and in his back pack, and that—when he talked—when I talked to him about—what I talked to him about was inferences, that if someone is found in possession of recently stolen property, the jury may infer that they are the ones that stole it and further, if it was a product of a burglary, the jury may infer that they committed the burglary. I know I told him about that, because that really mattered. . . . I couldn't imagine in my wildest dreams how he was going to explain that away[.]

Mr. Goodlett said that he and the petitioner discussed the petitioner's right to testify at trial. Counsel said that although the petitioner was a minor, he felt that the petitioner understood the right to testify as explained by himself, the Court, and counsel for the state.

Mr. Goodlett also said that he did not believe this case was not appropriate for a change of venue because at the time of trial, "I think Montgomery County had nearly a hundred and four thousand people in it and it just was not likely that out of that population . . . we could not get a jury of twelve people, who simply hadn't heard" about the petitioner's case. Mr. Goodlett recalled that "[t]here was a picture of Mr. Davis [in the paper] during trial and I have no doubt that there was something in the paper here locally, but . . . I can't recall anything on the television channels or on the radios[.]" He did not specifically recall the voir dire in this case, but he said that the Court "generally takes care of [publicity questions] early on." Counsel also acknowledged that questions regarding whether any potential jurors know a defendant are "always a part of voir dire."

Mr. Goodlett denied that he did not believe the petitioner's version of events, although counsel did tell the petitioner of his concern that the defense would have difficulty "convincing the jury that what he was saying could even begin to counteract what the State was saying[.] . . . I just didn't think it was going to carry the day[.]"

When asked about the merger of offenses, Mr. Goodlett said that he was unsure how the petitioner raised that argument, though he said that he would have filed a motion challenging to the indictment if a motion had been appropriate.

## V. STANDARDS OF REVIEW

### (A) Post-Conviction Proceedings

Pursuant to the Tennessee Post-Conviction Procedure Act, a petitioner is entitled to relief if the petitioner can establish that "the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103 (2006). The burden in a post-conviction proceeding is on the petitioner to prove the factual allegations contained in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Dellinger v. State, 279 S.W.3d 282, 296 (Tenn. 2009). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998) (citing Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.3 (Tenn. 1992)).

There is a rebuttable presumption that a ground for relief not raised before a court of competent jurisdiction in which the ground could have been presented is waived. Tenn. Code Ann. § 40-30-110(f). A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless: (1) the claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or (2) the failure to present the ground was the result of state action in violation of the federal or state constitution. Id. § 40-30-106(g)(1)-(2). Previously determined claims are also precluded from post-conviction review. See id. § 40-30-106(f). A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. Id. § 40-30-106(h). A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence. Id.

#### (B) Ineffective Assistance of Counsel

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show that (1) counsel's performance was deficient and (2) the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockart v. Fretwell, 506 U.S. 364, 368-372 (1993). In other words, a showing that counsel's performance falls below a reasonable

standard is not enough; rather, the petitioner must also show that but for the substandard performance, “the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). Failure to satisfy either prong results in the denial of relief. Strickland, 466 U.S. at 697. The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel’s representation fell below an objective standard of reasonableness or “outside the wide range of professionally competent assistance.” Strickland, 466 U.S. at 690. In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), the Tennessee Supreme Court held that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases.

The prejudice prong requires a petitioner to demonstrate that “there is a reasonable probability that, but for counsel’s professional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. “A reasonable probability means a probability sufficient to undermine confidence in the outcome.” Id. “The probable result need not be an acquittal. A reasonable probability of being found guilty of a lesser charge, or a shorter sentence, satisfies the second prong in Strickland.” Brimmer v. State, 29 S.W.3d 497, 508-09 (Tenn. Crim. App. 1998).

On claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. Adkins v. State, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

## VI. PETITIONER'S CLAIMS FOR RELIEF

### (A) Trial Counsel's Alleged Failures Regarding DNA Evidence (Issues 1 and 10 above)

The petitioner raises three assertions regarding his claim that Mr. Goodlett rendered ineffective assistance in addressing the DNA evidence in this case. In his pro se petition, the petitioner argues that trial counsel was ineffective for failing to challenge to introduce the introduction of DNA evidence through Detective Parrish, for Detective Parrish was not an expert in the field of "DNA testing" and was therefore unqualified to testify regarding the DNA testing results. In his second amended petition, the petitioner argues that counsel was ineffective for not investigating the identity of the "unknown male" identified as the "minor contributor" in the TBI serology report. Furthermore, at the evidentiary hearing the petitioner faulted counsel for not emphasizing the DNA testing results during trial.

After the direct appeal in the petitioner's case concluded, the United States Supreme Court concluded that scientific testing results such as the serology report in this case are "testimonial" evidence, and therefore a defendant's rights under the Confrontation Clause require (under most circumstances) the person performing the test to testify in court if the test results are to be admitted. See Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 564 U.S. \_\_\_, 131 S. Ct. 2705 (2011). Those opinions were filed long after the trial in this case, so counsel cannot be faulted for not anticipating future developments in the applicable case law. Furthermore, the petitioner was not prejudiced by counsel's declining to contest the introduction of the DNA results on hearsay or Confrontation Clause grounds. Excluding the DNA results—which excluded the petitioner as a source of DNA found inside the victim's body—from evidence would have prevented the jury from hearing perhaps the strongest evidence in this case favoring the petitioner.

Regarding the petitioner's assertion that trial counsel was ineffective for failing to identify the contributor of the male DNA found in the victim's rape kit, the Court first notes that the petitioner has provided no authority supporting his argument that such action constitutes ineffective assistance. Furthermore, to prevail at trial a defendant need not prove his innocence or conclusively point the finger of guilt at another individual. The main import of the serology evidence in this case was that the petitioner was excluded as the contributor of the DNA evidence found in the victim's rape kit. Trial counsel presented this evidence to the jury, and the jury also heard testimony that the victim's fiancé had sexual intercourse with the victim a day and a half before this incident. Evidence conclusively identifying the

actual source of the male DNA (be it the fiancé or some other man) would ultimately have added little (if anything) to the petitioner's case, so the Court concludes that Mr. Goodlett's declining to present such evidence did not constitute deficient performance. The Court also concludes that there is not a reasonable probability that the defendant would not have been found guilty of aggravated rape had the male DNA contributor been identified.

Finally, the Court concludes that Mr. Goodlett did not render deficient performance in addressing the DNA evidence during trial. The record reflects that Mr. Goodlett ended his cross-examination of Detective Parrish as follows:

- Q: Now, I want to be clear what we are saying when we look at this DNA test, that this DNA test excludes Mr. Davis. There is no DNA evidence that links Mr. Davis to this crime, is there?
- A: No, sir.
- Q: Whatsoever?
- A: Correct.

Furthermore, Mr. Goodlett began his closing argument to the jury with an extensive argument emphasizing that no DNA evidence connected to the petitioner was found in the victim's house, on the shoe laces used to bind the victim, or in the victim's rape kit. Counsel also emphasized that certain items that could have been tested for DNA, such as the victim's pubic hair and the defendant's underpants, were not tested. The petitioner's claim that trial counsel did nothing to emphasize the DNA evidence at trial is without merit.

For the reasons stated above, the court concludes that trial counsel did not render ineffective assistance regarding the DNA claims.

(B) Trial Counsel's Allegedly Inadequate Investigation and Preparation (Issues 6-8 above)

In his first amended petition, the petitioner argues that Mr. Goodlett rendered ineffective assistance of counsel by failing to properly investigate the case, failing to properly prepare for the trial, and for meeting with the petitioner only once prior to the week before trial, thus preventing the petitioner from discussing his case with counsel. The Court disagrees.

The Court notes that the amended petition does not identify any specific issues that counsel should have identified or investigated. To any extent that the investigation and preparation issue is related to counsel's alleged failures regarding the DNA evidence, the petitioner's issues associated with the DNA evidence were addressed above and found to be without merit. Additionally, the Court accredits Mr. Goodlett's testimony that he discussed this case with the petitioner several times before trial and finds the petitioner's statement that counsel met with the petitioner once prior to the week before trial to lack credibility. Mr. Goodlett's pretrial preparation, investigation, and client interaction in this case did not constitute deficient performance; thus, the Court concludes that trial counsel did not render ineffective assistance as to these claims.

(C) Multiplicity Claims (Issues 2 and 3 above)

The petitioner argues that Mr. Goodlett rendered ineffective assistance by not challenging the multiple aggravated rape counts and the burglary, robbery, and theft counts

of the indictment on multiplicity grounds.<sup>1</sup>

“An indictment is multiplicitous if it charges a single offense in more than one count.” State v. Young, 904 S.W.2d 603, 606 (Tenn. Crim. App. 1995) (citation omitted). “Resolving a question of multiplicity requires an analysis of the statutory crimes alleged as well as the factual circumstances.” Id. (citation omitted). In this case, the petitioner alleges that the three rape counts referenced one offense, and that the burglary, robbery, and theft counts referenced another single offense. The Court disagrees.

### *Aggravated Rape Counts*

The record reflects that the indictment charged the petitioner with three counts of aggravated rape, with each charge alleging a different form of penetration. One count alleged that the petitioner penetrated the victim’s vagina with his penis, another count alleged that the petitioner forced the victim to perform fellatio on him, and the third aggravated rape count alleged that the defendant performed cunnilingus on the victim. The evidence produced at trial established that these three different forms of penetration occurred during the same episode, but “[t]he single transaction test is not the rule in this state in determining whether an accused may be convicted of more than one offense committed during the course of a criminal episode.” State v. Burgin, 668 S.W.2d 668, 670 (Tenn. Crim. App. 1984) (citing State v. Black, 524 S.W.2d 913 (Tenn. 1975)). “[A]n accused may be convicted of

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<sup>1</sup>The defendant is not challenging his kidnapping conviction on multiplicity grounds.

more than one offense when the rape involves separate acts' of sexual penetration", even when the different acts of penetration occurred during the same criminal episode. State v. Phillips, 924 S.W.2d 662, 665 (Tenn. 1996) (citing Burgin, 668 S.W.2d at 670); see also State v. Peacock, 638 S.W.2d 837 (Tenn. Crim. App. 1982). Thus, the three separate counts of aggravated rape listed in the indictment were proper, and because the evidence was sufficient to convict the petitioner of the offenses, the three separate convictions for aggravated rape were appropriate. Trial counsel therefore did not render ineffective assistance for not challenging the aggravated rape counts on multiplicity grounds.

#### *Aggravated Burglary, Aggravated Robbery, and Theft Counts*

Regarding the aggravated burglary, aggravated robbery, and theft counts, the record reflects that the aggravated burglary count alleged that the petitioner entered the victim's residence intending to commit rape. The aggravated robbery alleged that the victim used a deadly weapon to take items from inside the victim's house, and the theft charge alleged that the petitioner took the victim's car.

The aggravated burglary and aggravated robbery counts were not multiplicitous because they referenced separate offenses—the burglary alleged that the petitioner intended to commit rape, not robbery. Even if the state had alleged that the petitioner intended to commit robbery, the indictment would not be multiplicitous. Nor can the indictment be considered multiplicitous because the petitioner was charged with aggravated burglary with

the underlying intent to commit rape and the rapes themselves. As the Tennessee Supreme Court stated in an opinion upholding convictions for burglary of an automobile and theft of the same automobile,

Under Tennessee law, “[a] person commits burglary who, without the effective consent of the property owner [e]nters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.” Tenn. Code Ann. § 39-14-402(a)(4) (1997 Repl.) (emphasis added). “Enter” is defined as an “[i]ntrusion of any part of the body; or [I]ntrusion of any object in physical contact with the body of any object controlled by remote control, electronic or otherwise.” Tenn. Code Ann. § 39-14-402(b) (1997 Repl.). Clearly, under this statutory definition, the crime of burglary is complete when entry has been made into an automobile without the owner's consent and with an intent to commit a felony, theft, or assault. See also State v. Lindsay, 637 S.W.2d 886, 889 (Tenn. Crim. App. 1982). Consummation of the intended felony, theft, or assault is not necessary to complete the crime of burglary. See Duchac v. State, 505 S.W.2d 237, 239 (Tenn. 1973); Mellons v. State, 560 S.W.2d 634, 635 (Tenn. Crim. App. 1977). Burglary is an offense against the security interest in possession of property rather than an offense against the legal title or ownership of the property. See State v. Davis, 613 S.W.2d 218, 220 (Tenn. 1981); Hindman v. State, 215 Tenn. 127, 384 S.W.2d 18, 20 (Tenn. 1964); Hobby v. State, 480 S.W.2d 554, 556 (Tenn. Crim. App. 1972).

In contrast, theft is an offense against the legal title or ownership of the property. In Tennessee, “[a] person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner’s effective consent.” Tenn. Code Ann. § 39-14-103 (1997 Repl.). Therefore, theft does not occur until the defendant obtains or exercises control over the property with the intent to deprive the owner of the property.

State v. Ralph, 6 S.W.3d 251, 255 (Tenn. 1999). Similarly, in an opinion upholding convictions for attempted first degree murder, aggravated burglary, and attempted especially aggravated robbery, the Court of Criminal Appeals stated,

attempted first degree murder, aggravated burglary and attempted especially aggravated robbery are narrowly defined by statute and each contains different elements. Aggravated burglary is a property offense and is completed upon entry into the habitation. Tenn. Code Ann. § 39–14–402(a)(1), –403(a); see Ralph, 6 S.W.3d at 255. Attempted first degree murder is a crime against the person, involves an intent to kill, and does not require an attempt to rob. Tenn. Code Ann. § 39–13–202(a)(1). Attempted especially aggravated robbery is a crime against the person which focuses upon the intent to rob, a deadly weapon and serious bodily injury. Tenn. Code Ann. § 39–13–403(a). Any of these offenses can be committed without necessarily committing another.

State v. Cowan, 46 S.W.3d 227, 234-35 (Tenn. Crim. App. 2000). These cases make clear that the offense of aggravated burglary as charged in the indictment could not be considered the same offense as the aggravated robbery, theft, or aggravated rape referenced in the other counts. Charging aggravated burglary in this indictment was proper, and therefore counsel did not render ineffective assistance for challenging that count on multiplicity grounds.

Similarly, the theft and aggravated robbery counts of the indictment charged the defendant with two separate offenses. Robbery is an offense against the person; therefore, if multiple items are taken from the person of one victim via use of violence or placing another in fear, there could be only one robbery conviction. However, “the use of violence or fear must precede or be contemporaneous with the taking of property from the person to constitute the offense of robbery under Tenn. Code Ann. § 39-13-401.” State v. Owens, 20 S.W.3d 634, 641 (Tenn. 2000); see also State v. Swift, 308 S.W.3d 827, 831 (Tenn. 2010) (in determining whether a theft can be considered a robbery, the court places strong emphasis on “[t]he temporal proximity between the taking of property and the use of violence or fear”). The Tennessee Supreme Court reversed robbery convictions in Owens and Swift because the

violence or fear element occurred long after the taking, but it is reasonable to conclude that a taking that occurs long after the victim is subjected to violence or placed in fear cannot constitute a robbery.

Furthermore, the car referenced in the theft count cannot be considered as a subject of the robbery count because the car was outside the victim's house and therefore the petitioner did not take the car from the victim's person. See State v. Miller, 608 S.W.2d 158, 160 (Tenn. Crim. App. 1985) ("taking from the person may be either actual or constructive. It is actual when the taking is immediately from the person and constructive when in the possession of the victim or in the victim's presence."). The theft and robbery counts clearly referenced separate offenses, and counsel therefore did not render ineffective assistance by not challenging those two counts on multiplicity grounds.

(D) Trial Counsel's Alleged Failures Regarding Publicity and Change of Venue (Issue 4 above)

The petitioner argues that he did not receive a fair trial by "a fair and impartial jury and judge." He asserts that extensive publicity rendered the jury pool (and, ultimately, the seated jurors) prejudiced against him, and that counsel rendered ineffective assistance for failing to file a change of venue or motion to continue "to allow a cooling off period[.]" The Court disagrees.

Although the petitioner asserts that his case received extensive coverage in "T.V., radio, [and] newspapers that were ran [sic] consta[n]tly for two weeks before the trial and

on the day of my trial, which the jury was exposed to”, the petitioner has failed to present evidence of such publicity to support his claim. Mr. Goodlett testified that this case did not receive extensive media coverage, and absent any evidence to support the petitioner’s claim of extensive publicity, the Court accredits trial counsel’s testimony. Thus, counsel’s declining to seek a change of venue or a continuance based on publicity concerns did not constitute deficient performance.

The petitioner also faults counsel for failing to question jurors about their exposure to potential publicity on voir dire. However, a transcript of voir dire was not included as an exhibit to these proceedings, so the Court is constrained to find that the petitioner has not established this factual allegation by clear and convincing evidence. In short, the Court concludes that trial counsel did not render ineffective assistance as to the publicity/voir dire issue.

(E) Trial Counsel’s Alleged Failure to Pursue Sentencing Under 2005 Amendments to Sentencing Act (Issue 5 above)

In his first amended petition, the petitioner argues that Mr. Goodlett rendered ineffective assistance for failing to advise the petitioner of his right to be sentenced under the 2005 amendments to the Sentencing Reform Act of 1989. The petitioner argues that because of counsel’s failure to do so, the petitioner ultimately received an excessive sentence pursuant to the sentencing law in effect at the time of these offenses.

The record reflects that the sentencing hearing in this case was held June 2, 2006. The

Court issued a written Sentencing Order on June 7, 2006. In 2005, the Tennessee General Assembly passed an act revising the Criminal Sentencing Reform Act of 1989. The 2005 act provided that the revisions to the Sentencing Reform Act would become effective June 7, 2005. See 2005 Tenn. Pub. Acts ch. 353, § 18. The act further provided,

Offenses committed prior [to June 7, 2005] shall be governed by prior law, which shall apply in all respects. However, for defendants who are sentenced after the effective date of this act for offenses committed on or after July 1, 1982, the defendant may elect to be sentenced under the provisions of this act by executing a waiver of such defendant's ex post facto protections. Upon executing such a waiver, all provisions of this act shall apply to the defendant."

Id. The offenses in this case occurred on November 8, 2004; thus, the Court agrees with the petitioner that he should have had the option to waive his ex post facto rights and elect to be sentenced under the 2005 revisions to the Sentencing Reform Act.

However, the Court does not agree that the petitioner was prejudiced by being sentenced under the sentencing laws in effect at the time of these offenses. Under the pre-2005 sentencing act, the "presumptive sentence" for a person convicted of a Class A felony, such as aggravated rape, was "the midpoint of the range if there are no enhancement or mitigating factors." Tenn. Code Ann. § 40-35-210(c) (2003) (amended 2005). The sentencing range for a Range I offender convicted of Class A felony is fifteen to twenty-five years, see Tenn. Code Ann. § 40-35-112(a)(1), so the petitioner's presumptive sentence under the former sentencing act was twenty years.

The petitioner argues,

According to the Sentencing Order filed by the Court, the Petitioner was sentenced to 20 years, the midpoint of the range, in each of the three convictions for Aggravated Rape. This is important because the U.S. Supreme Court in Blakely concluded that enhancement factors that were neither admitted by the appellant nor determined by a jury beyond a reasonable doubt, could not be used to enhance the sentence. Thus, under Blakely, the Petitioner would only have been sentenced to 15 years for each of the A felony convictions, had he been properly advised by trial counsel and executed a waiver of his ex post facto protections.

The Court's disagrees with the petitioner's assertion. In the Court's view, the petitioner appears to have a misunderstanding of the effect of the Blakely decision on the State's former and current sentencing schemes. In State v. Gomez, 239 S.W.3d 733, 740-41 (Tenn. 2007), the Tennessee Supreme Court concluded that Tennessee's pre-2005 sentencing scheme, which permitted the enhancement of sentences beyond the statutory maximum based on enhancement factors found solely by the trial court, violated the Sixth Amendment as interpreted by Blakely v. Washington, 542 U.S. 296 (2004), and Cunningham v. California, 549 U.S. 270 (2007). On direct appeal of this case, the Court of Criminal Appeals concluded that the two enhancement factors applied by this Court in its sentencing order—lack of hesitation to commit the offenses when the risk to human life was high and treating the victim with exceptional cruelty—violated the petitioner's Sixth Amendment protections. See Davis C.C.A. opinion, slip op. at 5. The appellate court concluded that because the trial court imposed a twenty-year sentence for aggravated rape, the statutorily-mandated presumptive sentence for a Range I offender convicted of a Class A felony, the

petitioner was not entitled to a sentence reduction for those offenses. Id. The appellate court did adjust the petitioner's aggravated burglary and aggravated robbery sentences based on Sixth Amendment concerns. Id., slip op. 7.

However, although the former sentencing scheme was subject to Sixth Amendment concerns, Blakely, Cunningham, and Gomez do not similarly affect Tennessee's post-2005 sentencing scheme. Had the petitioner been sentenced under the 2005 revisions to the sentencing act, the trial court would not have been bound by a "presumptive sentence" provision. The revised sentencing act does state that "[t]he minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications[.]" Tenn. Code Ann. § 40-35-210(c)(1) (2010). The statute also states, "The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors[.]" Id. § 40-35-210(c)(2). However, under the revised sentencing act "the court shall consider, but is not bound by" these provisions. Id. § 40-35-210(c) (emphasis added). "The amended statute no longer imposes a presumptive sentence. Rather, the trial court is free to select any sentence within the applicable range so long as the length of the sentence is consistent with the purposes and principles of [the Sentencing Act.]" State v. Carter, 254 S.W.3d 335, 343 (Tenn. 2008) (citing Tenn. Code Ann. § 40-35-210(d)).

Furthermore, under the revised sentencing act a trial judge's use of enhancement factors is advisory, and the application of such factors in enhancing a defendant's sentence

does not run afoul of the Sixth Amendment. See generally Cunningham v. California, 549 U.S. 270, 294 n.18 (2007) (identifying Tennessee’s revised sentencing act as one that does not run afoul of Sixth Amendment because the act allows judges to “exercise broad discretion . . . within a statutory range”).

Thus, had the petitioner elected to be sentenced under the 2005 revisions to the sentencing act, the trial court would not have been bound to sentence the petitioner to the minimum term of fifteen years on each aggravated rape count, as the petitioner suggests. The Court could have applied the two enhancement factors found inapplicable by the appellate court, and the Court would have been justified in imposing any sentence within the sentencing range even in the absence of sentence enhancement factors. In short, had the petitioner been sentenced under the 2005 amendments to the sentencing act, the petitioner could well have received a longer sentence. Even if trial counsel was deficient in not advising the petitioner fully about his sentencing options, counsel’s failure to seek sentencing under the 2005 sentencing act revisions did not prejudice the petitioner. Accordingly, the Court concludes that trial counsel did not render ineffective assistance as to this issue.

(F) Trial Counsel’s Alleged Failure to Advise Petitioner of Right to Testify (Issue 9 above)

In his first amended petition, the petitioner argues that Mr. Goodlett rendered ineffective assistance because the petitioner “wanted to testify at his jury trial but . . . counsel strenuously advised him that he should not testify because he would only anger the Judge and

Petitioner acquiesced only because he was only 16 or 17 years of age and was completely dependent on the advice of his counsel.”

Although Mr. Goodlett was not asked about his supposed comment that the petitioner’s testimony would anger the Court, the petitioner’s credibility concerns make the actual existence of such advice dubious at best. The record reflects that the Court advised the petitioner extensively of his right to testify and that the petitioner informed the Court that he understood his right to choose whether he would testify, and that he would be subject to cross-examination if he chose to testify. At the post-conviction evidentiary hearing, the petitioner testified that he understood his right to testify as explained by the Court. After an evening to reflect on his decision, the petitioner chose not to testify. Mr. Goodlett also testified that he discussed the petitioner’s right to testify with the petitioner.

The petitioner appears to regret his decision not to testify, but he has not presented clear and convincing evidence to establish that this decision resulted from counsel’s improperly dissuading him from testifying. Nor has the petitioner established that his decision not to testify prejudiced him at trial. Thus, the Court concludes that Mr. Goodlett did not render ineffective assistance as to this issue.

VII. CONCLUSION

For the reasons stated above, the petition for post-conviction relief is DENIED.

IT IS SO ORDERED this the 16<sup>th</sup> day of April, 2012

  
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John H. Gasaway, III  
Circuit Court Judge